

90-4 49

Supreme Court, U.S.

FILED

JUL 25 1990

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NO.

**In The
Supreme Court of the United States**

OCTOBER TERM, 1990

JAMES HAMILTON,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JIM WAIDE
ATTORNEY AT LAW
111 SOUTH BROADWAY
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

Attorney for Petitioners



QUESTIONS PRESENTED

1. Whether, in a forfeiture proceeding, the due process clause of the United States Constitution Amendment 5 requires notice to the possessor of property that his standing is at issue, before property may be forfeited on the grounds that the claimant lacks "standing".

2. Whether the United States Constitution's "standing" requirement is met by proof that one owns the real property, where the seized personal property is found.

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THE WRIT SHOULD BE GRANTED, SINCE THE FIFTH CIRCUIT IGNORED THIS COURT'S PRECEDENTS, INTERPRETING THE DUE PROCESS CLAUSE. DUE PROCESS REQUIRES THAT ONE NOT BE DEPRIVED OF HIS "PROPERTY", ABSENT REASONABLE NOTICE, SO THAT HE MAY HAVE A MEANINGFUL OPPORTUNITY TO BE HEARD 6

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CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment, United States Constitution

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES HAMILTON,

Petitioners

VERSUS

UNITES STATES OF AMERICA,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH Cir.CUIT**

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Cir.cuit is unreported. It is attached as an Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 26, 1990. This Court has jurisdiction to review by Writ of Certiorari under USC Sec. 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constituional provision involved in United States Constitu-tion Amendment Five, which says:

“No person shall be...deprived of life, liberty or property without due process of law....”

STATEMENT OF THE CASE

On November 30, 1987, the United States filed its complaint alleging that on September 2, 1986, state officials seized \$24,000.00 in cash, marijuana, from the residence of James A. Hamilton. The suit alleges that the currency was taken into custody of the United States on April 6, 1987, and claims the right to forfeiture under 28 USCA Section 881. R., Vol. 1, pp. 1-3.

The United States attached to its Complaint, the "Notice of Claim and Demand", and a cash bond of \$2,400.00 given by James Hamilton on May 22, 1987. R. Vol. 1, pp. 11-14. This "Notice of Claim and Demand" and bond was given pursuant to 21 CFR Section 1316.78, to stop administrative proceedings of forfeiture, and to demand the United States initiate forfeiture proceedings in the United States District Court. This "Notice of Claim and Demand" alleges that the property was seized unlawfully on September 2, 1986, and was unlawfully held without due process hearing by state's agents until April 22, 1987, at which time it was delivered to the United States. R., Vol. 1, pp. 11-12.

On November 30, 1987, the Magistrate directed the "arrest" of the money and service of process upon any person claiming an interest in it. R., Vol. 1, pp. 15. James Hamilton was served with process on December 14, 1987, and on December 29, 1987, Hamilton filed his answer, alleging an illegal search of property not

specified in the warrant, alleging the forfeiture proceeding was untimely, and alleging the money was not the result of any illegal narcotics dealings. R., Vol. 1, pp. 17-24.

With consent of the parties, the Court entered a pretrial Order, with the "pleadings being amended to conform to the Pretrial Order". R., Vol.1, pp. 96-100. The Pretrial Order contains the following contested issues of fact:

"Whether the money is "proceeds" or "exchange" money from or for illegal transactions involving controlled substances."

"A. Is the hearing so untimely as to deny procedural due process; and

B. Was the search in violation of the Fourth Amendment because it was done with a warrant which did not authorize search of the building searched."

R., Vol. 1, pp. 99. There is not a hint in the Pretrial Order that "standing" is an issue in the case.

The case was finally tried on December 8, 1988, shortly more than two years after the money was seized. R., Vol. 2.

The government's witnesses testified that on September 2, 1986, they had seized a large amount of marijuana and the \$24,000.00, from the home of James Hamilton. R., Vol 2, pp 16-77.

Hamilton attacked the government's right to forfeiture, by contending that the search was unlawful, because it was of a building different from the building authorized by the search warrant. R., Vol. 2 pp. 47-48; pp. 74-75. Introduction of this evidence was

was designed to demonstrate to the District Court that the forfeiture was unlawful, since the seizure of the money was made pursuant to an unconstitutional search. Under *Maryland v. Garrison*, 480 US 79, 94 L. Ed. 2d 72, 108 S. Ct. 1013 (1987), officers may not knowingly search a building different from the building specified in the search warrant.

Also, Hamilton introduced evidence of unnecessary delay in carrying out the forfeiture proceeding. R., Vol. 2, pp. 84-85; 87. Unnecessary delay in carrying out a forfeiture is a defense under familiar due process principles. *United States v. 23,407.69 in U.S. Currency*, 715 F. 2d 162 (5th Cir. 1983).

At the close of the trial, it seemed apparent that Hamilton would prevail on both issues. The search was clearly unconstitutional, since no warrant authorized the search of the building that was searched. A huge delay had expired before the initiation of the forfeiture proceeding.

However, The District Court granted the forfeiture, relying on a ground not contained in the Pretrial Order or Pleadings. The District Court ruled that Hamilton had not proved that he had any "standing" to claim the money, since he had not testified that he owned the money. R., Vol. 1, pp. 124-126. On November 5, 1989, three (3) years and one (1) month after the initial seizure, the District Judge ordered the money forfeited to the United States.

On April 26, 1990, the United States Court of Appeals for the Fifth Circuit affirmed, holding that, since Hamilton did not testify at the trial, he had not proved that he had "standing" to contest the forfeit.

ARGUMENT

THE WRIT SHOULD BE GRANTED, SINCE THE FIFTH CIRCUIT IGNORED THIS COURT'S PRECEDENTS, INTERPRETING THE DUE PROCESS CLAUSE. DUE PROCESS REQUIRES THAT ONE NOT BE DEPRIVED OF HIS "PROPERTY", ABSENT REASONABLE NOTICE, SO THAT HE MAY HAVE A MEANINGFUL OPPORTUNITY TO BE HEARD.

To a layman, any finding that Hamilton lacked standing could only be described as bizarre. After all, the United States was bringing this action on the theory that the presence of marijuana in Hamilton's home justified a finding that Hamilton was the owner or possessor of the marijuana. Any person with the slightest notion of common sense would instantly conclude that it was also the Government's theory that the fact that money was also found at the home was sufficient proof that the money was Hamilton's. Could the Government be contending, on the one hand, that the mere fact that the marijuana is found at one's home is proof that the marijuana belongs to him; but the fact that money is also found at the same place is no proof that the money belongs to the same individual? Neither the pleadings nor the Pretrial Order gave any hint that the Government contended any such strange thing. The pleadings alleged jurisdiction of the Court to consider the case, and the Claimant's answer did not dispute this charge. Most significantly, the Pretrial Order specifically stated that the only issues in the case were whether the search was legal, and whether the delay in the forfeiture proceeding violated due process. When the case went to trial, if ever there were a non-issue, it was whether Hamilton had standing.

Yet, seizing an opportunity to punish a drug dealer, irrespective of whatever sacrifice might be made to the Bill of Rights, the District Court endorsed the Government's position, allowing it to snap victory from the jaws of defeat by finding that, after all, Hamilton had never testified the money was his, and thus, lacked standing. The Fifth Circuit affirmed this holding, stating simply that Hamilton "had no standing to contest a forfeiture" and that the Court, therefore, "does not reach the other issues raised by Hamilton."

In holding that the money would be forfeited because Hamilton had not proved standing, when this issue was not raised in the Pretrial Order, the Fifth Circuit acted inconsistently both with its own precedents, and with the precedents of almost every other court of appeals, See *Fowler v. Crown - Zellerbach Corp.*, 163 F. 2d 773 (9th Cir. 1947) (Parties are bound by the issues listed in the Pretrial Order, and trial must be confined to those issues.); *Payne v. S. S. Nobob*, 302 F. 2d 803 (3rd Cir. 1962) (To preserve integrity of pretrial proceedings and to eliminate sporting theory of justice, Pretrial Order fixing the issues for trial must be strictly adhered to.); *Ely v. Reading Co.*, 424 F. 2d 758 (3rd Cir. 1970) (Trial Court properly refused to permit Plaintiff to call an expert witness, to testify to an issue which was not listed in the Pretrial Order.); *Johnson v. United States*, 193 F.2 d 969 (9th Cir. 1951) (Where validity of

rent order was not listed as an issue in pretrial conference, trial court could not consider that issue.); *Randolph County v. Alabama Power Co.*, 784 F. 2d 1067 (11th Cir. 1986) (Trial court properly excluded from trial factual allegations not contained in the Pretrial Order.); *Pierce Co. Hostel Employees and Restaurant Employees Health Trust v. Elks Lodge*, 827 F. 2d 1324 (9th Cir. 1987) (Where defenses of estoppel and lashes were not included in the Pretrial Order, the merits of these defenses could not be considered.); *Alcorn v. Phoenix*, 798 F. 2d 1260 (9th Cir. 1986) (District Court properly refused to consider argument that ordinance was unconstitutionally vague, where this was not listed as an issue in Pretrial Order.); *Glismann v. AT&T Technologies, Inc.* 827 F.2d 262 (8th Cir. 1987) (Trial court properly refused to permit employees in age discrimination case from considering employer's failure to invite them back to work during plant expansion, when this was not listed as issue in Pretrial Order.); *Solinsky v. Arthritis Foundation*, 635 F. Supp. 620 (E. D. NY, 1986) (Claims not listed in Pretrial Order are properly considered to be abandoned.); *Trinity Carton Co. v. Fallstaff Brewing Corp.*, 767 F. 2d 184 (5th Cir. 1985) (It is improper to permit amendment of a Pretrial Order when this amendment seeks to present an issue which was known to the parties at the time of the pretrial conference.)

However, there is the more serious error than ignoring innumerable precedents of the various courts of appeals. A failure to

give one claiming an interest in property notice of the issues is a violation not merely of orderly federal procedure, but of familiar constitutional principles. The United States Constitution Amendment V Due Process Clause requires that one be given reasonable notice of the issues.

In *Mullane v. The Central Hanover Bank and Trust Co.*, 339 U. S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873, (1949):

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated... to afford (a party) an opportunity to present objections.”

Here, because the issue of standing was not raised either in the pleadings or the Pretrial Order, Hamilton was never given notice or an “opportunity to present ‘his’ objections that he had standing. Had Hamilton been alerted, at the trial, that his standing was at an issue, it would have been a simple matter for his attorney to call him as a witness and ask whether or not he had either an equitable or legal interest in the money. Had he been so called, he could have then testified, as his answers to interrogatories stated that he owned one-fifth of the money, and was the bailee for the remainder.

¹ Because the issue of standing was never raised in the Pretrial Order,

¹ One has standing when he has either a legal or an equitable interest. Thus, the bailee of property has standing. *United States v. \$38,000.00 in U. S. Currency*, 816 F. 2d 1538 (11th Cir. 1987).

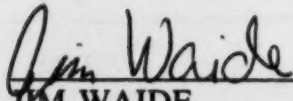
Hamilton did not know it was necessary to present such proof. By deciding the case on an issue of which Hamilton had no notice, the Court violated a fundamental precept of due process — that parties whose rights are affected are entitled to such notice as will permit them to protect their rights. See also, *Memphis Light Gas & Water Division v. Kraft*, 436 U. S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (Due Process was violated as to utility customers when they were given no notice of procedure to contest nonpayment of bills.)

A further reason for the granting of the writ is that the Fifth Circuit's definition of standing is completely at odds with the definition of standing, that this Court has delineated in numerous precedents. The Fifth Circuit ruled that standing may be obtained only if a person, at a forfeiture hearing, actually takes the witness stand, and testifies that he is the owner of the personal property sought to be forfeited. This ruling can not possibly be reconciled with this court's numerous precedents holding that standing requires only proof of a "legitimate expectation of privacy", in the area to be searched. See *Rakas v. Illinois*, 439 U. S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978) (Standing does not depend upon whether one is the owner of the goods seized, but depends upon whether one has a "legitimate expectancy of privacy in the invaded place"; *United States v. Aguirre*, 839 F. 2d 854, 857, (1st Cir. 1988) (Test for

standing is where the individual thought of the place searched as a "private one"; *United States v. Salvucci*, 488 U. S. 83, 65L. Ed. 2d 619, 100 S. Ct. 2547 (1980) (Standing, for constitutional purposes, depends upon whether the individual had a "legitimate expectancy of privacy" in the area searched, and is not dependant upon whether he had an expectation of privacy in the actual personal property which was seized.) Thus, by dismissing Hamilton's claim for lack of standing, the Fifth Circuit ignored both this Court's teachings as to the meaning of procedural due process, and ignored this Court's clear teachings as to the meaning of standing. Such clear disregard for this Court's precedents should be corrected through the granting of the writ.

Respectfully submitted,

JIM WAIDE
ATTORNEY AT LAW
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324


JIM WAIDE
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff, do hereby certify that I have this day mailed, postage-prepaid, three true and correct copies of the above and foregoing to the following:

Honorable Robert Q. Whitwell
P. O. Box 886
Oxford, MS 38655

This the 31st day of August, 1990.

Jim Waide
JIM WAIDE

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APPENDIX
IN THE
UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-4769
SUMMARY CALENDAR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

\$24,000.00 IN
UNITED STATES CURRENCY,

Defendant,

AND

JAMES A. HAMILTON

Claimant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
(EC-87-359-B-D)

(April 26, 1990)

Before REAVLEY, KING and JOHNSON, Circuit Judges.

PER CURIAM: ¹

Claimant James A. Hamilton appeals the judgment of the District Court ordering the forfeiture of \$24,000.00 confiscated in a narcotics seizure. We affirm.

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens of the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

In September 1986, state and county police officers executed a search warrant for narcotics that named the residence of James A. Hamilton (Hamilton). Upon execution of the warrant, officers discovered and confiscated a quantity of marijuana, assorted narcotics paraphernalia, triple beam scales and \$24,000.00 in United States Currency. As a result of the seizure, Hamilton was arrested and subsequently convicted in a Mississippi Circuit Court for possession of marijuana with intent to distribute. Hamilton's conviction was affirmed on direct appeal.

At the request of local authorities, the DEA, in an adoptive seizure, took possession of the \$24,000.00. Thereafter, the United States filed a complaint in federal district court seeking judicial forfeiture of the currency. Concluding that Hamilton had not established standing to contest the search, the federal district court ordered the forfeiture of the \$24,000.00. The district court also determined that the Government had established probable cause for a belief that there was a connection between the currency and the narcotics which were seized. Hamilton thereafter filed this timely appeal.

II. DISCUSSION

The \$24,000.00 claimed by Hamilton was forfeited pursuant to 21 U.S.C. § 881 (a) (6) which implicitly provides that only an owner of forfeited property enjoys standing to contest the forfeiture. This Court has held that the question of standing is a threshold one which federal courts must consider even if neither party raises the

issue. See **United States v. One 18th Century Colombian Monstrance**, 797 F.2d 1370, 1374 (5th Cir. 1986). In forfeiture cases such as the one at bar, the claimant bears the burden to "first demonstrate an interest in the [currency] sufficient to satisfy the court of [his or her] standing to contest the forfeiture. **United States v. \$364,960.00**, 661 F.2d 319, 326 (5th Cir. 1981) (citations omitted). The federal district court in this case concluded that Hamilton did not meet that burden. We are constrained to agree.

At the forfeiture proceedings in the federal district court, Hamilton failed to testify and admittedly did not submit any evidence of an ownership interest in the \$24,000.00 at issue. The federal district court, while acknowledging that Hamilton owned the property whence the currency came, nevertheless properly recognized that mere possessory interest in a place is not "tantamount to a sufficient claim of interest in the currency seized therefrom." **United States v. \$15,500.00**, 558 F.2d 1359, 1361 (9th Cir. 1977). Moreover, as the district court noted, even if it could be presumed that Hamilton enjoyed any entitlement to the \$24,000.00, such presumption was overcome by Hamilton's failure to come forth with any evidence to that effect, the Government's evidence that Hamilton was not engaged in any gainful activity that would generate that kind of income, and Hamilton's assertion in a pretrial interrogatory that he only had a one-fifth possessory interest in the currency.

On these facts, we are not persuaded that the district court erred in ordering the \$24,000.00 claimed by Hamilton forfeited. The

burden of establishing standing is placed squarely on the shoulders of the claimant who seeks to defeat the forfeiture. *See United States v. \$321,470.00 in United States Currency*, 874 F.2d 298,302 (5th Cir. 1989). Because Hamilton did not meet that burden, he had no standing to contest the forfeiture. So concluding, we do not reach the other issues raised by Hamilton.

III. CONCLUSION

Hamilton did not establish standing to contest the forfeiture. The district court accordingly did not err in ordering the \$24,000.00 forfeited. The judgment of the district court is affirmed.

AFFIRMED



②
No. 90-449

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR

Solicitor General

ROBERT S. MUELLER, III

Assistant Attorney General

THOMAS E. BOOTH

Attorney

Department of Justice

Washington, D.C. 20530

(202) 514-2217

QUESTION PRESENTED

Whether, in this civil forfeiture action, the courts below properly held that petitioner failed to establish his standing to contest the forfeiture.

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JAMES HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 13-16) and the district court (App., *infra*, 1a-10a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1990, and the petition for a writ of certiorari was filed on July 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed this action in the United States District Court for the Northern District of Mississippi, seeking civil forfeiture of \$24,000 in cur-

rency seized from petitioner's residence during the execution of a warrant authorizing a search for drugs. Following a bench trial, the district court entered judgment for the United States, holding that petitioner had not established his standing to contest the forfeiture and that the United States in any event had established its entitlement to forfeiture. App., *infra*, 1a-10a). The court of appeals affirmed on the standing ground. Pet. App. 13-16.

1. In September 1986, state law enforcement agents executing a warrant authorizing the search of petitioner's residence seized marijuana, assorted drug paraphernalia, several weapons, and \$24,000 in United States currency. The currency was found in packets of \$1000 each in two bags hidden within the cinderblock foundation under the house. Next to the currency was a suitcase containing 18 packages of marijuana weighing 18½ pounds. Petitioner was convicted in state court of possession of marijuana with intent to distribute it, and his conviction was affirmed on appeal. *Hamilton v. State*, 556 So. 2d 685 (Miss. 1990); Pet. App. 14; App., *infra*, 3a-4a.

2. In November 1987, at the request of local authorities, the United States took possession of the \$24,000 and filed a complaint in federal district court seeking forfeiture of the currency under 21 U.S.C. 881(a)(6). That section provides for the forfeiture of, *inter alia*, all moneys and other things of value furnished or intended to be furnished in exchange for a controlled substance, all proceeds of such an exchange, and all moneys used or intended to be used to facilitate a violation of the federal drug laws. Section 881(a)(6) further provides that no property shall be forfeited "to the extent of the interest of an owner, by reason of any act or omission established

by that owner to have been committed or omitted without the knowledge or consent of that owner."

Petitioner filed a claim to the currency. At trial, however, he did not testify or present any evidence to show that he had an interest in the currency. The district court granted judgment for the United States. App., *infra*, 1a-10a. It first held that petitioner lacked standing to contest the forfeiture. *Id.* at 5a-7a. The court pointed out that Section 881(a)(6) excludes from forfeiture only those interests in seized property that belong to an innocent "owner." App., *infra*, 5a-6a. Here, the court reasoned, petitioner failed to bring himself within that provision because he "did not testify and admittedly did not submit any evidence of an interest in the seized money." *Id.* at 6a. In the alternative, the court held that there was probable cause to believe that the currency had been obtained in exchange for drugs, in view of its location and proximity to the marijuana and drug paraphernalia, and that it therefore was properly forfeited to the United States. *Id.* at 7a-8a. The district court also rejected petitioner's contentions that the currency was seized pursuant to an illegal search and that the delay in instituting the civil forfeiture action violated due process. *Id.* at 8a-10a.

3. The court of appeals affirmed the judgment of forfeiture on the ground that petitioner lacked standing to contest the forfeiture. Pet. App. 13-16. The court of appeals reasoned that only an owner of property has standing under 21 U.S.C. 881(a)(6) to contest a forfeiture, that the burden is on the claimant to establish his standing, and that a court must decide a standing issue even if it is not raised by the parties. Pet. App. 14-15, 16. In this case, the court concluded that petitioner did not carry his burden of

establishing standing because he did not testify at trial and admittedly did not offer any evidence that he had an ownership interest in the \$24,000. Although the court recognized that petitioner owned the property from which the currency was seized, it determined that any inference of entitlement to the currency that might have arisen from his ownership of the premises was overcome by his failure to present any evidence of his entitlement, by the government's evidence that petitioner was not working at a job that would generate that kind of income, and by petitioner's assertion in a pretrial interrogatory that he had only a one-fifth possessory interest in the currency. *Id.* at 15.

ARGUMENT

The unpublished decision of the court of appeals affirming the judgment of forfeiture because petitioner failed to produce evidence that he had an interest in the currency is correct and does not conflict with any decision of this Court or of another court of appeals. Review therefore is not warranted.

1. The courts have uniformly held that in order to contest a forfeiture, a claimant must first demonstrate a sufficient interest in the property to establish his standing to do so. See, e.g., *United States v. One (1) 1976 Cessna Model 201L Aircraft*, 890 F.2d 77, 79-80 (8th Cir. 1989); *United States v. Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1262 (2d Cir. 1989); *Mercado v. United States Customs Service*, 873 F.2d 641, 644 (2d Cir. 1989); *United States v. Premises Known as 526 Liscum Drive*, 866 F.2d 213, 216 (6th Cir. 1989); *United States v. United States Currency, in the Amount of \$103,387.27*, 863 F.2d

555, 560 n.10 (7th Cir. 1988); *United States v. One Parcel of Real Property Known as the Rod and Reel Fish Camp*, 831 F.2d 566, 567-568 (5th Cir. 1987); *United States v. \$38,000.00 in United States Currency*, 816 F.2d 1538, 1543-1544 (11th Cir. 1987); *United States v. \$5,644,540.00 in United States Currency*, 799 F.2d 1357, 1365 (9th Cir. 1986). The court below correctly invoked that settled principle in this case.

Petitioner does not challenge the court of appeals' legal ruling that a claimant in a civil forfeiture action must establish his standing. Instead, petitioner argues (Pet. 6-9) that the district court should not have applied that principle in the circumstances of this case because the standing issue was not specifically identified in the pretrial order. As this Court has recently reiterated, however, a standing issue may (and indeed must) be decided by the court, even if it is not raised by the parties, because standing must appear affirmatively in the record and because the burden is on the party who seeks the exercise of jurisdiction in his favor to demonstrate his standing. *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 607-608 (1990); *Juidice v. Vail*, 430 U.S. 327, 331-332 (1977); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (opinion of Marshall, J.). The district court therefore properly addressed the standing issue and properly held that petitioner did not have standing in this case (in light of his failure to produce any evidence that he had an interest in the property), even though that issue was not specifically identified in the district court's pretrial order.¹

¹ Petitioner asserts (Pet. 6) that standing could be inferred from the fact that the government's theory of the civil forfeiture action was that the presence of the marijuana in the

Contrary to petitioner's contention (Pet. 7-8), the decision below does not conflict with the decision of any other court of appeals. The appellate decisions cited by petitioner simply sustained district court rulings that declined to allow a party to raise an issue that was precluded by a pretrial order entered pursuant to Fed. R. Civ. P. 16(e). Those decisions do not stand for the quite different proposition petitioner advances—namely, that it is reversible error for a district court to allow consideration of an issue that was not identified in the pretrial order. And in fact district courts have been held to have the discretion to do so where, as here, the circumstances warrant. See generally 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1527, at 279-286 (2d ed. 1990) (collecting cases). Moreover, the decisions petitioner cites did not involve jurisdic-

house justified a finding that it belonged to petitioner, and that the discovery of the money at the house justified a finding that it belonged to petitioner as well. Contrary to petitioner's contention, however, since this is an in rem forfeiture action, in which the currency (not petitioner) is the defendant, it was not necessary for the government to prove that either the marijuana or the currency belonged to anyone in particular. The discovery of the currency—in packets of \$1000 each, together with marijuana at a hidden location under the house—was sufficient to support a finding of probable cause to believe that the currency was the proceeds of or used or intended to be used in or to facilitate a drug transaction by *someone*. Consistent with this view, the complaint did not allege that the defendant currency belonged to petitioner, and the district court concluded that “[t]he storage of the unexplained \$24,000.00 in close proximity to a suitcase of eighteen pounds of marijuana in the cinder block foundation of the claimant's house indicates that the money seized is drug-related,” especially since it was packaged in a manner known to be used by drug dealers. App., *infra*, 8a.

tional questions, which, unlike most other issues, can be raised at any time.

Petitioner's further contention (Pet. 9-10) that the district court's consideration of the standing issue violated due process is also without merit. Since the requirement of standing is a fundamental and elementary principle of law—in the forfeiture context as elsewhere—petitioner was on notice that he was required to establish his standing in order to prevail in the forfeiture action.²

2. The courts below correctly concluded that petitioner failed to carry his burden of establishing his standing because he did not testify or present any evidence at trial that he had an interest in the \$24,000. First, the court of appeals properly questioned whether an inference of a sufficient interest in the currency might have been drawn solely from petitioner's interest in the residence in which it was found. This Court has recently held that standing may not be predicated on inferences and presumptions, and instead must be affirmatively shown. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3189 (1990); *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. at 608-610. Moreover, as the court of appeals further noted, any such inference that might have been drawn as an initial matter in this case was overcome by petitioner's failure to produce any evidence to corroborate it, by the government's evidence that petitioner was not engaged in any gainful

² Petitioner's argument (Pet. 10-11) that the decision below conflicts with this Court's decisions concerning the requirements for establishing standing under the Fourth Amendment is meritless, because no Fourth Amendment issue is presented in this case. The fact that petitioner owned the premises on which the currency was located did not, in itself, give him an ownership interest in the currency.

activity that would have generated that sort of income, and by petitioner's assertion in a pretrial interrogatory that he had only a one-fifth possessory interest in the currency. Pet. App. 15. Petitioner does not appear to challenge this fact-bound assessment of the evidence, and it does not in any event warrant further review.

3. Finally, even if we assume, arguendo, that petitioner had standing to contest the forfeiture, the district court nevertheless correctly entered a judgment of forfeiture in favor of the United States. Under 21 U.S.C. 881(a)(6), the United States was only required to establish probable cause to believe that the \$24,000 was furnished or intended to be furnished in exchange for a controlled substance; the burden then shifted to petitioner to come forward with evidence of a legitimate source of the funds. 21 U.S.C. 881(d), incorporating 19 U.S.C. 1615; see *Wood v. United States*, 41 U.S. (16 Pet.) 342, 366 (1842); *Taylor v. United States*, 44 U.S. (3 How.) 197, 211 (1845); *United States v. Parcels of Land*, 903 F.2d 36, 38 (1st Cir. 1990); *United States v. Premises Known as 526 Liscum Drive*, 866 F.2d at 216; *United States v. One 1986 Mercedes Benz*, 846 F.2d 2, 4 (2d Cir. 1988); *United States v. A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 628 (11th Cir. 1986). Here, the presence of the \$24,000 in 24 separate packets, located next to a suitcase containing 20 pounds of marijuana and placed in the cinder block foundation under the house—coupled with the contemporaneous seizure of more marijuana, weapons, and assorted drug paraphernalia inside the house—plainly was ample to establish probable cause to believe that the currency was connected to drug trafficking. Petitioner did not then carry his burden of re-

butting that showing by introducing evidence of another, legitimate source or intended use of the funds.

In these circumstances, even if the courts below erred in relying on petitioner's failure to introduce any evidence of a legitimate, non-drug-related interest in the property to establish his standing to challenge the forfeiture, the absence of any such evidence required that his claim be rejected on the merits, as the district court held. App., *infra*, 4a-5a, 7a. There is, in short, no unfairness in the judgment of forfeiture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

NOVEMBER 1990

APPENDIX

**IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

No. EC87-359-B-D

UNITED STATES OF AMERICA, PLAINTIFF

v.

\$24,000 IN U.S. CURRENCY, DEFENDANT

JAMES A. HAMILTON, CLAIMANT

[Filed Oct. 5, 1989]

MEMORANDUM OPINION

This cause was taken under advisement following a bench trial. The court has duly considered oral argument, testimony, exhibits, and the parties' post-trial memoranda and is ready to render a decision in accordance with Rule 52 of the Federal Rules of Evidence [*sic*].

I. Introduction

The government brought this civil forfeiture action pursuant to 21 U.S.C. § 881(a)(6) alleging that the

defendant money is proceeds or exchange money from or for illegal transactions involving controlled substances. 21 U.S.C. § 881(a)(6) reads in pertinent part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . . .

The defendant money was seized on September 2, 1986 by state law enforcement officers. The federal government adopted the seizure, filed an administrative notice of forfeiture on May 15, 1987, and instituted this action on November 30, 1987. On October 30, 1987, claimant James Hamilton was convicted in state court of possession of marijuana greater than one kilogram with intent to distribute.

II. Facts

On September 2, 1986, a confidential informant reported to David Gillespie, a Clay County deputy sheriff, that he witnessed a cocaine sale conducted by the claimant at his residence in Oktibbeha County, Mississippi within the past twenty-four hours. The claimant's property includes a two-story building and a one-story building, with white exteriors and maroon trim, located on a single lot. Gillespie and Officer

Steve Westbrook drove to the lot in order to ascertain the location and the layout of the premises. The closest and most prominent building seen from the road is the two-story dwelling with a basketball court in front. The claimant resided in the one-story dwelling located to the immediate left and to the back of the two-story building, as viewed from the road. Gillespie believed that the buildings were part of a single dwelling where the claimant resided.

Based upon an affidavit and statement of the informant's observation presented by Gillespie and Westbrook, the Justice Court Judge of Oktibbeha County, Mississippi issued a search warrant describing the two-story dwelling "together with all approaches and appurtenances thereto." The search warrant further states that "the place described above is occupied and controlled by James Hamilton." On September 2, 1986, Sheriff Dolph Bryan and other officers searched both dwellings and most of the automobiles on the claimant's lot. Sheriff Bryan and Officer Charlie McVay testified that they intended to search the claimant's residence. At the time of the search, the two-story building was unoccupied and the second floor, according to Sheriff Bryan, was under construction. The search of the one-story building resulted in the seizure of the following items:

- (1) a wooden box containing one bag of marijuana weighing 67 grams;
- (2) a triple beam scale;
- (3) drug paraphernalia;
- (4) a brown suitcase containing eighteen cellophane-wrapped packages containing approximately a pound of marijuana per package; and
- (5) \$24,000, segregated into twenty-four envelopes containing \$1,000 each, stuffed into two Crown Royal bags.

The officers found the defendant money and the suitcase containing marijuana in the cinder block foundation under the one-story building. In order to get to the marijuana and money, the officers had to crawl through a small opening in the foundation and crawl under the house to the cinder blocks constituting part of the foundation in which the items were put by someone. By whom, we know not. Several pistols were also seized during the search.

III. Burden of Proof

The government has the burden to prove probable cause for the institution of this forfeiture action. 19 U.S.C. § 1615; 21 U.S.C. § 881(d). However, some courts, including the Fifth Circuit, have held that the claimant has the initial burden of proving that he has standing to contest the government's forfeiture. *United States v. \$38,000*, 816 F.2d 1538, 1543-44 n.12 (11th Cir. 1987) (the government does not bear the initial burden of proving probable cause "unless the claimant makes a valid claim that he has a legally cognizable interest in the property that will be injured if the property is forfeited to the government"); *United States v. One 18th Century Colombian Monstrance*, 802 F.2d 837, 838 (5th Cir. 1986) (claimant "must show at least a facially colorable claim to an ownership interest" to establish a case or controversy in the constitutional sense), *cert. denied sub nom. Newton v. United States*, 481 U.S. 1014, 95 L.Ed.2d 496 (1987). If the court finds that the claimant has standing to contest the forfeiture, then the burden of proof shifts to the government to show probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the

statute; i.e., the exchange of a controlled substance.

United States v. \$38,600, 784 F.2d 694, 697 (5th Cir. 1986). If the court finds probable cause, the burden shifts to the claimant to present any affirmative defenses to the forfeiture or rebut the government's evidence and show that the seized currency was not used to facilitate a narcotics transaction. *United States v. \$364,960*, 661 F.2d 319, 325 (5th Cir. 1981).

IV. Standing

In its post-trial memoranda, the government contends that the claimant failed to establish at trial any interest in the defendant currency and lacks standing to contest the forfeiture. The claimant argues that standing was never raised in this action and that it is not listed as an issue in the pretrial order. The Fifth Circuit has held:

Standing . . . is literally a threshold question for entry into a federal court, limiting the exercise of its jurisdiction, and the court must consider the standing of any party even if the issue has not been raised by the parties to the action.

United States v. One 18th Century Colombian Monstrance, 797 F.2d 1370, 1374, *reh'g denied*, 802 F.2d 837 (5th Cir. 1986). The claimant had the burden to "first demonstrate an interest in the [defendant currency] sufficient to satisfy the court of [his] standing to contest the forfeiture." *United States v. \$364,960*, 661 F.2d at 326.

21 U.S.C. § 881(a)(6) provides that the interest of an innocent owner is not subject to forfeiture:

[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner,

by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Accordingly, the owners have standing to contest a 21 U.S.C. § 881(a)(6) forfeiture. *United States v. One Parcel of Real Property*, 831 F.2d 566, 567, 568 (5th Cir. 1987) (legislative history construes the term owner as "any person with a recognizable legal or equitable interest in the property seized"). Ownership or a possessory interest with characteristics of dominion and control are sufficient to establish standing. *United States v. \$38,000*, 816 F.2d at 1544; *United States v. \$30,800*, 555 F.Supp. 280, 283 (E.D.N.Y.), *aff'd*, 742 F.2d 1444 (2d Cir. 1983).

It is undisputed that the claimant owns the real property from which the defendant currency was seized. However, the claimant did not testify and admittedly did not submit any evidence of an interest in the seized money. Mere ownership of the premises or area in which the money was found is insufficient to confer standing. *United States v. \$30,800*, 555 F.Supp. at 284 (possession of an apartment does not constitute ownership or possession of the currency therein); *United States v. \$15,500*, 558 F.2d at 1360-61 (possessory interest in a safety deposit box is not "tantamount to a sufficient claim of interest in the currency seized therefrom"). Even if the claimant is deemed to have had possession of the currency at the time of the seizure, any presumption of entitlement¹ is overcome by the government's

¹ In a motion for the return of money seized for use in a criminal prosecution, possession of the money gives rise to a rebuttable presumption of entitlement. *United States v. Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979) (a claimant need not produce additional evidence of ownership unless serious

evidence, the claimant's failure to offer any proof, and his assertion in an interrogatory answer of only a one-fifth interest in the currency. Sheriff Bryan and Officers McVay and Westbrook testified that their investigations of the claimant did not disclose any history of gainful activity that would generate any income in the amount of money to be forfeited. The court finds that the claimant failed to prove any interest sufficient to establish standing and thus may not contest the forfeiture of the defendant money.

V. Probable Cause

Even if the claimant had a valid interest in the defendant currency, he introduced no evidence of any work history or employment to establish that the \$24,000.00 is proceeds from a lawful activity. See *United States v. \$364,960*, 661 F.2d at 327 n.20 (citing *United States v. \$11,580*, 454 F.Supp. 376, 381 (M.D. Fla. 1978) (no explanation how an itinerant unemployed waiter acquired the sizable sum to be forfeited)). The probable cause standard in a forfeiture action is whether there is a

reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.

United States v. \$38,600, 784 F.2d 694, 697 (5th Cir. 1986). The Eleventh Circuit held that in proving probable cause

[t]he government need not trace the cash to specific transactions, or actually prove by a pre-

doubts are raised by the government or an adverse claimant). See *United States v. \$364,960*, 661 F.2d at 327 n.19 (noting the distinction between *Wright* and a forfeiture action).

ponderance of evidence a substantial connection to drug dealing.

United States v. \$41,305, 802 F.2d 1339, 1343 (11th Cir. 1986). Probable cause may be based wholly upon circumstantial evidence. *Id.*

The storage of the unexplained \$24,000.00 in close proximity to a suitcase of eighteen pounds of marijuana in the cinder block foundation of the claimant's house indicates that the money seized is drug-related. The packaging of twenty-four envelopes containing \$1,000.00 each stuffed into two Crown Royal bags is the type of packaging known to be used by drug dealers for proceeds of drug sales. The contemporaneous seizure of an additional quantity of marijuana, drug paraphernalia, weapons, and a scale commonly used to weigh drugs gives rise to a reasonable belief that a substantial connection exists between the seized money and illegal narcotics transactions. In consideration of the items seized and the claimant's conviction, the court finds that the government established probable cause to believe that the defendant currency was used, or intended to be used, in exchange for a controlled substance, and therefore is forfeitable.

VI. Affirmative Defenses

Assuming *arguendo* that the claimant has established standing to contest the forfeiture, his affirmative defenses of an unlawful search and unreasonable delay have no merit. The claimant argues that the search was not limited to the specific place described in the warrant, the two-story building, in violation of the fourth amendment. The United States Supreme Court has held that

the scope of a lawful search is "defined by the object of the search and the places in which

there is probable cause to believe that it may be found."

Maryland v. Garrison, 480 U.S. 79, 84, 94 L.Ed.2d 72, 81 (1987) (quoting *United States v. Ross*, 456 U.S. 798, 824, 72 L.Ed.2d 572, 593 (1982)). Since there was probable cause to believe that the object of the search, illegal drugs, would be found in the claimant's residence, exclusion of the claimant's one-story dwelling from the scope of the authorized search would be inconsistent with the intended purpose of the search. See *United States v. Prout*, 526 F.2d 380, 387-88 (5th Cir.), *reh'g denied*, 529 F.2d 999, *cert. denied*, 429 U.S. 840, 50 L.Ed.2d 109 (1976) (adjacent separate apartment not specifically described in warrant was properly searched in light of the physical layout of the premises and use by the defendants); *United States v. Judd*, 687 F. Supp. 1052, 1057-59 (N.D. Miss. 1988) (warrant specifically designating a particular office suite authorized the search of a separate office since the misdescription reflected a misunderstanding of the building's floor plan).

The claimant complains of the fifteen-month delay between the seizure and the institution of this action. The federal government adopted the case from the state government and filed an administrative notice of forfeiture approximately eight and one-half months after the seizure and filed this action six and one-half months later. The forfeiture hearing was held one year after the commencement of this action. Since the court should consider only the delay on the part of the federal government, it is unnecessary to rule on the claimant's objection to Mississippi Bureau of Narcotics staff attorney Kay Cobb's testimony regarding the initial delay in state court. The

claimant neither alleged nor proved any prejudice to his ability to defend against the forfeiture. Therefore, the court finds that even in the event the claimant had standing, the federal government's delay was not unreasonable and did not deny the claimant due process. See *United States v. \$8,850*, 461 U.S. 555, 569, 76 L.Ed.2d 143, 155 (1983) (eighteen-month delay between seizure and filing of forfeiture action was not unreasonable); *United States v. \$11,580*, 454 F.Supp. at 381-82 (fact that forfeiture action was filed approximately eleven and one-half months after seizure "lends no support to the claim of prejudice").

CONCLUSION

For the foregoing reasons, the defendant money should be forfeited to the federal government.

An order will issue accordingly.

THIS, the 5th day of October, 1989.

/s/ Neal B. Biggers
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE